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A

Rutinin bin Suhaimin v Public Prosecutor

B

HIGH COURT (KOTA KINABALU) — CRIMINAL APPEAL NO BKI-K42–18/11 OF 2013
RICHARD MALANJUM CJ (SABAH AND SARAWAK)
18 JUNE 2014

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Impugning entry via internet protocol account of the accused on stated date, time and place — Whether accused made and initiated transmission of impugned entry — Whether computer and internet account accessed by other persons — Communications and Multimedia Act 1998 s 233

D

The appellant appealed against his conviction for an offence under s 233 of the Communications and Multimedia Act 1998 ('the Act'). He was sentenced to a fine of RM15,000 in default eight months imprisonment. There were two trial sessions court judges involved in this case. The first trial judge discharged and acquitted the appellant at the end of the prosecution's case. The prosecution successfully appealed to the High Court, resulting in the reverse of the appellant's acquittal. He was ordered to enter on his defence ('the first appeal'). The first trial judge was replaced by the second trial judge who then convicted the appellant and sentenced him accordingly. The prosecution cross-appealed on the inadequacy of the sentence imposed. The prosecution's case was based on an entry of a comment 'Sultan Perak Sudah gilaaaa!!!!!' ('the impugned entry') via the internet protocol account ('the internet account') of the appellant on the stated date, time and place. In calling for the defence, the High Court judge premised it on the availability of circumstantial evidence that should have been relied upon by the first trial judge. Dissatisfied with the decision of the second trial judge, the appellant submitted that the second trial judge simply rejected his defence solely based on her disbelief in the testimonies of the appellant and his witnesses. It was also submitted that the case was not considered as a whole vis-a-vis the defence of the appellant before determining that the prosecution had proved its case beyond reasonable doubt. The defence of the appellant was that he did not make and initiate the transmission of the impugned entry despite the fact that his internet account was used. To support his assertion, the appellant relied on the fact that his computer and his internet account were accessible by other persons and on the day mentioned in the charge his IP line was on continuously login from the 8am to past 7pm. Any user could have simply clicked the mouse and the computer would have been ready for use including his internet account. It was also the assertion of the defence that one person at the shop and using the computer at the material time was PW18.

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Held, allowing the appeal and dismissing the cross-appeal by the prosecution:

(1) The second trial judge appeared to have taken the erroneous approach. She disbelieved in the testimonies of the appellant and the other defence witnesses on the basis that the allegations or assertions made by the appellant and his witnesses at the defence stage were not rose during the cross-examination of the relevant prosecution's witnesses. As such, no weight was given to those allegations and took them as a recent invention. Her approach thus led her to find that the defence had not raised any reasonable doubt in the prosecution's case (see para 31).

(2) There was hardly any consideration on the probable defence based on the undisputed fact that the computer and the internet account of the appellant were accessible by third parties. The fact became more critical as there was not an iota of evidence adduced by the prosecution that it was the appellant who actually made and initiated the transmission of the impugned entry. At best it was merely inferred that it must be him since the computer and the internet account belonged to him (see para 33).

(3) It would appear to be more in the mind of the second trial judge that the impugned entry must have been done by the appellant as he failed to show that another person did it. In other words, the onus of proof was shifted to the appellant. There was no presumption in s 233(1)(a) for the appellant to rebut. The onus remained with the prosecution to establish beyond reasonable doubt that it was the appellant who made and initiated the transmission of the impugned entry (see para 34).

(4) In adopting the erroneous approach and in failing to consider the probable defence of the appellant, the second trial judge had misdirected herself in law. The defence of the appellant was seriously prejudiced by the erroneous approach adopted by the second trial judge. If the learned second trial judge had adopted the correct approach and did not summarily dismiss the version of the appellant as a mere recent invention, her decision might have been different. On that point alone the conviction of the appellant was not safe to uphold (see para 36).

[Bahasa Malaysia summary

Perayu merayu terhadap sabitannya untuk kesalahan di bawah s 235 Akta Komunikasi dan Multimedia 1998 ('Akta'). Dia dihukum denda sebanyak RM15,000 atau lapan bulan penjara. Terdapat dua hakim perbicaraan mahkamah sesyen yang terlibat dalam kes ini. Hakim perbicaraan pertama melepaskan dan membebaskan perayu pada akhir kes pendakwaan. Pihak pendakwaan berjaya dalam rayuannya di Mahkamah Tinggi, menyebabkan pembalikan pembebasan perayu. Dia telah diarahkan untuk memasukkan pembelaannya ('rayuan pertama'). Hakim perbicaraan pertama telah digantikan oleh hakim perbicaraan kedua yang kemudiannya mensabitkan perayu dan menghukum dengan sewajarnya. Pendakwaan mengemukakan

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rayuan balas terhadap kekurangan hukuman yang dikenakan. Kes pendakwaan adalah berdasarkan kemasukan komen 'Sultan Perak Sudah gilaaaa !!!!!' ('kemasukan yang menjadi persoalan itu') melalui akaun protokol internet ('akaun internet') perayu pada tarikh yang dinyatakan, masa dan tempat. Memanggil pembelaan, hakim Mahkamah Tinggi berasaskan kepada keterangan mengikut keadaan yang sepatutnya diguna pakai oleh hakim pertama. Tidak berpuas hati dengan keputusan hakim perbicaraan kedua, perayu berhujah bahawa hakim perbicaraan kedua hanya menolak pembelaannya semata-mata berdasarkan kepada ketidakpercayaannya dalam keterangan perayu dan saksi-saksinya. Adalah turut dihujahkan bahawa kes itu tidak dipertimbangkan secara menyeluruh berhubung dengan pembelaan perayu sebelum memutuskan bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Pembelaan perayu adalah bahawa dia tidak membuat dan memulakan penghantaran kemasukan yang dipersoalkan walaupun akaun internetnya telah digunakan. Untuk menyokong dakwaannya, perayu bergantung kepada fakta bahawa komputernya dan akaun internetnya telah diakses oleh orang lain dan pada hari yang disebut dalam pertuduhan itu talian IP nya terus-menerus melog masuk dari pukul 8 pagi hingga 7 malam. Mana-mana pengguna boleh hanya menekan tetikus dan komputer telah sedia untuk digunakan termasuk akaunnya. Adalah juga penegasan pembelaan bahawa hanya seorang di kedai telah menggunakan komputer pada masa tersebut adalah PW18.

Diputuskan, membenarkan rayuan dan menolak rayuan balas oleh pihak pendakwaan:

(1) Hakim perbicaraan kedua telah mengambil pendekatan yang salah. Dia tidak percaya dengan keterangan perayu dan saksi pembelaan yang lain atas dasar bahawa tuduhan atau dakwaan yang dibuat oleh perayu dan saksi di peringkat pembelaan tidak dibangkitkan semasa pemeriksaan balas saksi pendakwaan. Oleh itu, tiada berat telah diberikan kepada semua tuduhan dan mengganggapnya sebagai ciptaan baru. Pendekatannya itu menyebabkan dia mendapati pihak pembelaan tidak membangkitkan apa-apa keraguan yang munasabah pada kes pendakwaan (lihat perenggan 31).

(2) Hampir tiada apa-apa pertimbangan pada kemungkinan pembelaan berdasarkan kepada fakta yang tidak dipertikaikan bahawa komputer dan akaun internet perayu telah diakses oleh pihak ketiga. Fakta itu menjadi lebih kritikal memandangkan tiada *iota* keterangan dikemukakan oleh pihak pendakwaan bahawa ia adalah perayu yang telah melakukan dan memulakan penghantaran kemasukan yang dipersoalkan itu. Paling tidak ia hanya disimpulkan bahawa ia mesti perayu memandangkan komputer dan akaun internet adalah miliknya (lihat perenggan 33).

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(3) Ia kelihatan dalam fikiran hakim kedua bahawa kemasukan yang dipersoalkan itu mesti dilakukan oleh perayu kerana dia gagal untuk menunjukkan bahawa ada orang lain melakukannya. Dalam erti kata lain, beban pembuktian beralih kepada perayu. Tidak ada anggapan dalam s 233(1)(a) bagi perayu untuk dipatahkan. Beban itu kekal dengan pihak pendakwaan untuk membuktikan melampaui keraguan munasabah bahawa adalah perayu yang melakukan dan memulakan penghantaran kemasukan yang dipersoalkan (lihat perenggan 34).

(4) Dalam menggunakan pendekatan yang salah dan gagal untuk mempertimbangkan pembelaan kemungkinan perayu, hakim perbicaraan kedua telah tersalah arah dalam undang-undang. Pembelaan perayu telah serius terjejas kerana pendekatan yang salah yang diterima pakai oleh hakim perbicaraan kedua. Jika Yang Arif hakim kedua yang telah mengguna pakai pendekatan yang betul dan tidak menidakkan versi perayu sebagai ciptaan baru semata-mata, keputusannya mungkin berbeza. Atas perkara itu sahaja sabitan perayu tidak selamat untuk dipertahankan (lihat perenggan 36).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Browne v Dunn (1893) 6 R 67, HL (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Mat v Public Prosecutor [1963] MLJ 263 (refd)
Mohd Harmizi bin Che Arifin v PP [2010] 6 MLJ 64, CA (refd)
Ramlan bin Salleh v Public Prosecutor [1987] 2 MLJ 709, SC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Communications and Multimedia Act 1998 s 233, 233(1)(a), (b), (3)

Muammar Julkarnain (Jumahad Julkarnain & Ahmadshah) for the appellant.
Jamil Aripin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak):

INTRODUCTION

[1] The appellant is appealing against his conviction for an offence under s 233 of the Communications and Multimedia Act 1998 ('the Act'). He was

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sentenced to a fine of RM15,000 in default eight months imprisonment.

[2] The prosecution has a cross-appeal on the inadequacy of the sentence imposed.

[3] There were two trial sessions court judges involved in this case. The first trial judge discharged and acquitted the appellant at the end of the prosecution's case.

[4] The prosecution successfully appealed to the High Court. The acquittal of the appellant was reversed. He was ordered to enter on his defence ('the first appeal').

[5] But by the time the first appeal was heard the first trial judge had already left for further study. The learned High Court judge therefore ordered that the defence should be heard before another trial judge.

[6] After hearing the defence the second trial judge convicted the appellant and sentenced him accordingly.

THE CHARGE

[7] The charge preferred against the appellant reads:

> Bahawa kamu pada 13/02/2009 jam lebih kurang 6.33 petang di alamat Blok A, Lot 4 kedai SEDCO 89300 Kundasang di dalam daerah Ranau dalam Negeri Sabah telah menggunakan perkhidmatan applikasi iaitu Internet Protokol 60.52.46.189 secara sedar membuat dan memulakan penghantaran komen yang jelik sifatnya iaitu 'Sultan Perak Sudah gilaaaaaaa!!!!!!' di http://books.dreambook.com/duli/duli.html yang mempunyai pautan laman web pejabat Duli Yang Maha Mulia Sultan Perak iaitu http://sultan.perak.gov.my dengan niat untuk menyakitkan hati orang lain. Oleh itu kamu telah melakukan satu kesalahan di bawah subseksyen 233(1)(a) Akta Komunikasi dan Multimedia 1998 [Akta 588] dan boleh dihukum di bawah subseksyen 233(3) Akta yang sama.
>
> (Hukuman: Boleh didenda tidak melebihi lima puluh ribu ringgit atau dipenjarakan selama tempoh tidak melebihi satu tahun atau kedua-dua).

[8] Section 233(1)(a), (b) and (3) of the Act reads:

> (1) A person who —
>
> (a) by means of any network facilities or network service or applications service knowingly —
>
> (i) makes, creates or solicits; and
>
> (ii) initiates the transmission of,

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(b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.

...

(3) A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction.

THE DECISION IN THE FIRST APPEAL

[9] Section 233(1)(b) is included above because although the charge preferred against the appellant was under s 233(1)(a) the learned High Court judge premised his decision under (b).

[10] This is what he said, inter alia:

... The crucial ingredient of this offence is as follows:

1 That the accused person had made the communication in question through a network facility.

2 The communication was made with 'with intent to annoy, abuse, threaten or harass any person'.

The learned Session Court Judge should have therefore considered whether:

1 On the evidence adduced by the prosecution, whether direct or circumstantial, he could rule that the accused person initiated the communication in question.

2 Whether the communication in question, ie 'Sultan Perak Sudah gilaaaaaa!!!!' is either annoying or abusive.

3 Whether the accused had intention to annoy or abuse any person.

After having considered all the arguments of the learned DPP and learned counsel for respondent, it is my opinion that this appeal should be allowed.

[11] In the course of preparing this judgment I noted the error. I directed therefore the deputy registrar Kota Kinabalu to call the parties and highlight the issue and to find out their respective stands. Both parties indicated that they did not wish to raise the issue and agreed that this court should proceed to judgment. As such I decline to make any ruling or finding on the issue.

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THIS APPEAL

[12] The prosecution's case could be gleaned from the charge itself, namely, that there was an entry of a comment 'Sultan Perak Sudah gilaaaa!!!!!' ('the impugned entry') via the internet protocol account ('internet account') of the appellant on the stated date, time and place.

[13] In calling for the defence the learned High Court judge premised it on the availability of circumstantial evidence that should have been relied upon by the learned first trial judge. He said this, inter alia:

> The learned Session Court Judge adverted to the lack of direct evidence as fatal. He has erred in coming to the conclusion as he completely failed to consider the strength of the circumstantial evidence in this case.
>
> ...
>
> The evidence of the prosecution witnesses simply means that the communication was made from the internet account and the computer of the accused person.
>
> ...
>
> There was no evidence that any other person used the computer at the time in question. The accused was present in the shop that evening. It was a hand phone repair shop. It was not a cyber café whose computer account is open for public use. The employees of the accused did not say that they used the computer at the material time or had posted the remark in question. They also did not say that any particular customer had used the computer at the time in question.
>
> ...
>
> The accused was the owner of the shop and the holder of the internet account which was used to post the remark in question. Although the new section 114A does not apply to the instant case as the offensive remark was posted before 31st July 2012, the circumstantial evidence is sufficiently strong to conclude that the accused had used the internet account that was registered in his name at the material time. The accused is not required to rebut any statutory presumption but he is still required to raise a reasonable doubt that he was not responsible for the posting in question.

[14] It is therefore clear that defence was called based on the inferences derived from the circumstantial evidence alluded to by the learned High Court judge.

[15] And having perused the appeal record the following facts are not in dispute:

(a) that the impugned entry was made and transmitted using the Internet Protocol 60.52.46.189 ('IP line') registered in the name of the appellant;

(b) that the IP line was on continuously login on Friday February 13th from 08:51.40am to 19:19.52pm; and

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(c) that the appellant did his hand-phone repairs works at the back of the shop while his computer was located at the front part of the shop.

[16] It was also not an issue that the impugned entry was transmitted 'with intent to annoy, abuse, threaten or harass another person'.

[17] In finding the appellant guilty of the offence as per charge the learned second trial judge said that she disbelieved the testimonies of the appellant and the witnesses he called.

[18] In disbelieving the version of the appellant the learned second trial judge gave her reasons thus:

(a) for disbelieving the testimony of the appellant ('DW1'):

(i) the matters he raised in his testimony were not raised during the cross-examination of the prosecution's witnesses especially PW13 (Farah Wahida bte Haminin), PW14 (Wan Khazrullutfy) and PW18 (Saudin Sahmin) and as such they were of recent invention; and

(ii) his credibility as a witness was in doubt. He claimed that he allowed his friends to use his computer when he was in the shop and when he went out for a while. Yet on the fateful evening the evidence showed that the appellant went out for much longer period thereby making his evidence inconsistent and unbelievable;

(b) for disbelieving the testimony of Zim @ Al Zubir bin Rusinin ('DW2'):

(i) he was not telling the truth and was trying very hard to support the defence story. He shifted his version from knowing the password of the computer to not remembering it while it was the evidence of appellant that his computer did not require any password;

(ii) that his story of coming to the shop at 6.40pm and seeing it unlocked and unattended could not be probable. It was very unlikely that PW18 would leave the shop without the appellant being there; and

(iii) that DW2 did not know who was using the computer at 6.33pm on 13 February 2009.

(c) for disbelieving the testimony of Sahididn bin Simin ('DW3'):

(i) he said that at 6pm he came to the shop to have his hand-phone repaired but the appellant was not there. However he saw PW18 was at the shop. Yet this allegation was not put to PW18 during his cross-examination.

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(d) For disbelieving the testimony of Yusbiri @ Ramzi bin Japi ('DW4'): A

(i) he was a friend of the appellant. Also he assumed that the appellant was not in the shop at that time since his motorcycle was not parked in front of the shop. Further, he did not know who was using the computer on that fateful evening between 6.30pm to 6.40pm B

[19] In summary the defence of the appellant was rejected because the assertions he made during the defence stage were not raised during the prosecution stage. They were therefore categorised as recent inventions and deserved no weight or consideration as a defence. C

[20] Dissatisfied with the decision of the learned second trial judge the appellant submitted several grounds in his petition of appeal. However, his main complaint is that the learned second trial judge simply rejected his defence solely based on her disbelief in the testimonies of the appellant and his witnesses. She disbelieved in their testimonies because the assertions made during the defence stage were not raised during the prosecution stage. It was also submitted that the case was not considered as a whole vis-a-vis the defence of the appellant before determining that the prosecution had proved its case beyond reasonable doubt. D E

[21] Basically the defence of the appellant was that he did not make and initiate the transmission of the impugned entry despite the fact that his Internet account was used. To support his assertion the appellant relied on the fact that his computer and his Internet account were accessible by other persons and on the day mentioned in the charge his IP line was on continuously login from the 8am to past 7pm. Any user could have simply clicked the mouse and the computer would have been ready for use including his Internet account. It was also the assertion of the defence that one person at the shop and using the computer at the material time was PW18. F G

[22] Before considering the merits of this appeal it is necessary to clarify first the legal principle, that is, the consequences in failing to raise an issue or allegation during the cross-examination of a witness who could have addressed such issue or allegation. H

[23] This is because lately an erroneous approach seems to have appeared in relation to the application of such legal principle. There is a perception that such failure will result in any allegation if raised subsequently be deemed a recent invention or an afterthought. No or very little evidential value will be given to such allegation. Thus, if an accused person fails to do so any allegation I

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he raises at the defence stage will be considered an afterthought. It will not cast any reasonable doubt in the prosecution's case. A verdict of guilty upon the accused person is thus entered.

[24] Such erroneous approach has overlooked or misunderstood the true rationale in *Browne v Dunn* (1893) 6 R 67, (HL) as explained by our courts subsequently.

[25] In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 it was made clear that the 'correct statement of the law is that *failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony*, ... On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions ...', per Raja Azlan Shah CJ (Malaya) (as His Highness then was). (Emphasis added.)

[26] Thus, it is clear that such failure only goes to the credibility of the testimony of a witness who should have been cross-examined on the issue or allegation. Otherwise the witness's evidence on the issue or allegation stands provided he has raised it. But the mere failure to cross-examine the witness does not necessarily affect the credibility of the other witnesses who may raise the issue or allegation subsequently. Neither can it be used to summarily label the issue or allegation raised subsequently as a recent invention.

[27] In *Mohd Harmizi bin Che Arifin v Public Prosecutor* [2010] 6 MLJ 64 the Federal Court had to reiterate that the importance of putting an accused's defence to the prosecution's witness 'cannot be over emphasised'. The court went on to say this:

> In *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 at p 218 (MLJ) and p 718 (CLJ), the Federal Court explained the purpose of the defence having to put its case to the crucial witness for the prosecution:
>
> > ... in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.
>
> The Federal Court made it clear that *although a court may view with suspicion a defence which was not put to the appropriate prosecution witness who might have*

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> *personal knowledge of the point of issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.* (Emphasis added.)

(see also *Mat v Public Prosecutor* [1963] MLJ 263; *Ramlan bin Salleh v Public Prosecutor* [1987] 2 MLJ 709.)

[28] In a much earlier case a similar principle was stated. In *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29 Sharma J had this to say:

> The learned president, in my view, was therefore right in dismissing the defence by saying 'Neither was his defence probable, reasonable or consistent with innocence in all the circumstances of this case.'
>
> *One is, however, not entitled to infer the guilt of the appellant from the mere fact that the explanation he gave was rightly rejected by the learned president. A process in a criminal trial may negative the innocence of the accused but that negative process per se does not establish the guilt of the accused which the law requires the prosecution to prove by positive evidence. There is always a duty on the prosecution to prove its case and that duty has to be discharged before an accused can be convicted.* (Emphasis added.)

[29] Thus, the erroneous approach is not in tandem with the legal principles expounded in the above cases.

[30] Reverting therefore to this present case this is how the learned second trial judge came to her conclusion:

> As a conclusion DW1 only raised those issues during defence stage and Court could not give any weight to those allegations since it is a recent invention.
>
> ...
>
> I also considered whether the defence had raised a reasonable doubt although I disbelieved the testimonies of the accused and his witnesses. I find that it does not.'

[31] It is obvious that the learned second trial judge appeared to have taken the erroneous approach. She disbelieved in the testimonies of the appellant and the other defence witnesses on the basis that the allegations or assertions made by the appellant and his witnesses at the defence stage were not raised during the cross-examination of the relevant prosecution's witnesses. As such no weight was given to those allegations and took them as a recent invention. Her approach thus led her to find that the defence had not raised any reasonable doubt in the prosecution's case.

[32] With respect the learned second trial judge should have borne in mind that 'failure on the part of the defence to put its case as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt'. Further, although she might have

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viewed 'with suspicion a defence which was not put to the appropriate prosecution witness who might have personal knowledge of the point of issue', she was 'still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it'.

[33] In this case there was hardly any consideration on the probable defence based on the undisputed fact that the computer and the internet account of the appellant were accessible by third parties. This fact became more critical as there was not an iota of evidence adduced by the prosecution that it was the appellant who actually made and initiated the transmission of the impugned entry. At best it was merely inferred that it must be him since the computer and the internet account belonged to him.

[34] It would appear to be more in the mind of the learned second trial judge that the impugned entry must have been done by the appellant as he failed to show that another person did it. In other words the onus of proof was shifted to the appellant.

[35] With respect there is no presumption in s 233(1)(a) for the appellant to rebut. The onus remained with the prosecution to establish beyond reasonable doubt that it was the appellant who made and initiated the transmission of the impugned entry. Nothing less.

[36] In adopting the erroneous approach and in failing to consider the probable defence of the appellant the learned second trial judge had misdirected herself in law. The defence of the appellant was seriously prejudiced by the erroneous approach adopted by the learned second trial judge. If the learned second trial judge had adopted the correct approach and did not summarily dismiss the version of the appellant as a mere recent invention her decision might have been different. On this point alone the conviction of the appellant is not safe to uphold.

[37] No doubt the learned second trial judge did take into account the credibility and the demeanour of the defence's witnesses as the other factors in her refusing to believe in the defence version. But reading her reasoning as a whole those other factors hardly played a role in leading her to disbelieve the defence's witnesses. The main and dominant reason was the failure to cross-examine the prosecution's witnesses on those allegations that were raised during the defence stage.

[38] Anyway, to be fair to the learned second trial judge she did say this in her judgment:

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Even if I disbelieve the accused and his witnesses, I must still consider whether his defence raises a reasonable doubt on the case for the prosecution as there is no duty cast on the accused to prove anything.

The alleged comment undeniable was sent through accused computer with his computer and his IP's number from his shop. The accused's defence is one of complete denial of he is the one who had posted it. He called three other witnesses to introduce that it was PW18's act.

[39] But still her overall consideration of the defence did not go further than a re-assessment of the witnesses for the defence. She held, rather erroneously, that the defence was a mere denial. She failed to consider the version of the appellant. In denying the charge it was the case of the appellant that his computer and internet account were accessible by third parties at the material time, hence the probability that another person could have made and initiated the transmission of the impugned entry. The learned second trial judge should not have shifted the onus upon the appellant to prove that it was PW18 who did the transmission failing which it must have been him. By doing as she did the learned second trial judge made the appellant proved his innocence instead of the prosecution having to prove its case beyond reasonable doubt.

[40] As regards the rejection of the testimonies of the witnesses for the defence on the ground that there were inconsistencies, the learned second trial judge appeared to have overlooked a principle of law that just because a witness told lies on one or two points should not be the basis to totally reject his evidence. 'Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject' (see *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151).

[41] Accordingly the learned second trial judge failed to apply the correct legal principle when she rejected outright the evidence of the witnesses called by the appellant. If she had applied the correct legal principle she might have come to a different conclusion.

[42] On perusal of the testimonies of the witnesses called by the appellant in his defence, there is nothing to indicate that they were untruthful witnesses. They related what they could recall that evening. The common factor in their evidence was that there were people in the shop that evening and that the computer and the internet account of the appellant were available for use by third parties including them and PW18. In my view there was nothing glaringly untruthful in what they said. In fact their evidence of the availability

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of the computer and the internet account to other people was in tandem with the evidence of PW13 and PW18. As such I find that the evidence of the witnesses of the appellant were wrongly rejected. If they had been taken into account in considering the case as a whole they could have cast a reasonable doubt in the prosecution's case.

[43] In respect of the circumstantial evidence alluded to in calling for the defence, as indicated above, it was based on the fact that the impugned entry was transmitted using the computer and the Internet account of the appellant. Thereupon it was thus inferred that it must have been the appellant who made and initiated the transmission of the impugned entry.

[44] In my view such inference tantamount to invoking a presumption against the appellant which the law then did not allow. It remained the burden upon the prosecution to prove beyond reasonable doubt that the circumstantial evidence and thus the inference therefrom did not lead to any other conclusion other than the guilt of the appellant.

[45] However, on the unchallenged fact that the computer and the internet account were accessible by other persons as per the evidence of PW13, PW18 and from the evidence of the witnesses called by the appellant in his defence the circumstantial evidence and thus the inference thereto loses its sting. Indeed it was the evidence of the witnesses called by the appellant that even on the fateful evening they were people using the computer, in particular PW18. In fact PW18 in his evidence merely said that he could not remember where he was that fateful evening as opposed to the clear assertion by the appellant, DW2 and DW3.

[46] There were also some references to statements made by PW13 and the appellant during the investigation of this case. Such references were intended perhaps to undermine their credibility as witnesses. With respect such statements were only relevant if they were used to impeach the witnesses. There was no impeachment in this case. As such the evidence of the witnesses during the hearing must be assessed as they stood without the need to refer to their statements given during the investigation.

[47] For the foregoing reasons it could not be said that the defence did not cast any reasonable doubt in the prosecution's case. Further, due to the misdirection in law committed it could not be said that it would be safe to sustain the finding of guilt upon the appellant. Hence, I allow this appeal, set aside the conviction and the sentence imposed. Any fine paid is to be refunded to the appellant on the expiry of the prescribed appeal period.

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[48] Since this appeal is allowed the cross-appeal by the prosecution is therefore dismissed.

Appeal allowed and cross-appeal by prosecution dismissed.

Reported by Afiq Mohamad Noor